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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

MARK BRYANT, individually and on behalf of all others similarly situated,

Case No. 3:21-cv-05262-JLR

CLASS ACTION

FIRST AMENDED CLASS ACTION COMPLAINT FOR DAMAGES

JURY TRIAL DEMANDED

FISHER INVESTMENTS, INC.

Plaintiff,

V.

Defendant.

Plaintiff Mark Bryant brings this class action against Defendant Fisher Investments, Inc. (“Defendant”) and alleges as follows upon personal knowledge as to themselves and their own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by their attorneys.

NATURE OF THE ACTION

This is a putative class action pursuant to the Telephone Consumer Protection Act, 47 U.S.C. §§ 227, *et seq.* (the “TCPA”).

1. Defendant is a “fee-only investment adviser serving institutional and private clients globally.”¹

2. Defendant violated the TCPA by placing solicitation calls to individuals' who have listed their telephone numbers on the National Do Not Call Registry.

3. Through this action, Plaintiff seeks injunctive relief to halt Defendant's unlawful conduct, which has resulted in the invasion of privacy, harassment, aggravation, and disruption of the daily life of thousands of individuals. Plaintiff also seeks statutory damages on behalf of themselves and members of the Class, and any other available legal or equitable remedies.

JURISDICTION AND VENUE

4. This Court has federal question subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, as the action arises under the Telephone Consumer Protection Act, 47 U.S.C. §§ 227, *et seq.* (“TCPA”).

5. The Court has personal jurisdiction over Defendant and venue is proper in this District because Defendant's principal place of business is in this District.

PARTIES

6. Plaintiff is a natural person who, at all times relevant to this action, was a citizen and domiciled in the State of North Carolina.

7. Defendant is a Delaware corporation whose principal office is located at 5525 NW Fisher Creek Drive, Camas, WA 98607. Defendant directs, markets, and provides its business activities throughout the state of North Carolina.

8. Unless otherwise indicated, the use of Defendant's name in this Complaint includes all agents, employees, officers, members, directors, heirs, successors, assigns, principals, trustees, sureties, subrogees, representatives, vendors, and insurers of Defendant.

¹ <https://www.fisherinvestments.com/en-us/about> (last visited March 11, 2021).

FACTS

9. Beginning in approximately the fall of 2020, Defendant began calling Plaintiff's cellular telephone number ending in 1809 (the "1809 Number").

10. The telephone calls Plaintiff received originated from numerous telephone numbers, including 919-659-7211.

11. The telephone number 919-659-7211 is owned and/or operated by Defendant.

12. In total, Defendant has called the 1809 number approximately fifteen times.

13. At the time Plaintiff received Defendant calls, Plaintiff was the subscriber and user of the 1809 Number.

14. The 1809 Number is Plaintiff's personal cell phone number and not a business phone number.

15. The 1809 Number has been registered with the National Do Not Call Registry since October 24, 2009.

16. Defendant's calls constitute telemarketing/advertising/solicitations because they encouraged the future purchase or investment in property, goods, or services; specifically, the use of Defendant's financial products and services.

17. At no point in time did Plaintiff provide Defendant with his consent to be contacted by marketing telephone calls.

18. Plaintiff never directly provided Defendant with the 1809 Number.

19. Plaintiff never inquired into any of Defendant's good or services.

20. Plaintiff never made a purchase from Defendant and has never had any type of business relationship with Defendant.

21. Plaintiff has not purchased or transacted with Defendant in the 18-months prior to receipt of the first call from Defendant.

22. Plaintiff asked Defendant multiple times to cease calling the 1809 Number. Despite this, Defendant placed calls to the 1809 Number after Plaintiff's request to cease calls to the 1809 Number.

23. Plaintiff revoked any type of consent or permission Defendant may have had to contact his telephone with solicitations.

24. Defendant failed to honor or abide by Plaintiff's opt-out requests and continued to repeatedly call Plaintiff after he asked for the calls to stop.

25. Defendant's failure to abide by Plaintiff's opt-out requests is indicative of Defendant's lack of a written policy for maintaining internal do not call procedures.

26. Defendant's failure to abide by Plaintiff's opt-out requests is indicative of Defendant's failure to institute procedures for maintaining a list of persons who request not to receive telemarketing calls.

27. Defendant's failure to abide by Plaintiff's opt-out requests is indicative of Defendant's failure to maintain an internal do not call list, as well as inform and train its personnel engaged in telemarketing in the existence and the use of any internal do not call list.

28. Defendant's failure to abide by Plaintiff's opt-out requests demonstrates that Defendant does not record opt-out requests or place subscribers' names and telephone number on any do-not-call list at the time the requests are made.

29. Defendant's unsolicited communications caused Plaintiff harm, including invasion of privacy, aggravation, annoyance, intrusion on seclusion, trespass, and conversion. Defendant's call also inconvenienced Plaintiff and caused disruption to his daily life.

CLASS ALLEGATIONS

PROPOSED CLASS

30. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P. 23, on behalf of Plaintiff and all others similarly situated.

31. Plaintiff brings this case on behalf of the Class defined as follows:

INTERNAL DO NOT CALL CLASS: All persons within the United States who, within the four years prior to the filing of this Complaint, (1) were a call, (2) regarding Defendant's goods, products or services, (3) to said person's residential telephone number, (4) after making a request to Defendant to not receive future calls.

1 **DO NOT CALL CLASS:** All persons in the United States who
2 from four years prior to the filing of this action: (1) were sent a call;
3 (2) more than one time within any 12-month period; (3) where the
4 person's telephone number had been listed on the National Do Not
5 Call Registry for at least thirty days; (4) for the purpose of
6 advertising and/or promoting Defendant's products and/or services.
7

8 32. Plaintiff reserves the right to modify the Class definitions as warranted as facts are
9 learned in further investigation and discovery.

10 33. Defendant and its employees or agents are excluded from the Classes. Plaintiff does
11 not know the number of members in the Classes but believes the Classes members number in the
12 several thousands, if not more.

13 **NUMEROUSITY**

14 34. Upon information and belief, Defendant has placed calls to telephone numbers
15 belonging to thousands of consumers throughout the United States. The members of the Classes,
16 therefore, are believed to be so numerous that joinder of all members is impracticable.

17 35. The exact number and identities of the members of the Class are unknown at this
18 time and can only be ascertained through discovery. Identification of the Class members is a
19 matter capable of ministerial determination from Defendant's call records.

20 **COMMON QUESTIONS OF LAW AND FACT**

21 36. There are numerous questions of law and fact common to members of the Class
22 which predominate over any questions affecting only individual members of the Class. Among
23 the questions of law and fact common to the members of the Class are:

- 24 a) Whether Defendant initiated telemarketing calls to telephone numbers listed on
25 the National Do Not Call Registry;
- 26 b) Whether Defendant honors consumer opt-out requests;
- 27 c) Whether Defendant maintains an internal do-not-call list and trains its
28 employees on use of that list;
- 29 d) Whether Defendant is liable for damages, and the amount of such damages; and
- 30 e) Whether Defendant should be enjoined from such conduct in the future.

1 37. The common questions in this case are capable of having common answers. If
2 Plaintiff's claim that Defendant routinely makes unlawful solicitation calls is accurate, Plaintiff
3 and the Class members will have identical claims capable of being efficiently adjudicated and
4 administered in this case.

5 **TYPICALITY**

6 38. Plaintiff's claims are typical of the claims of the Class members, as they are all
7 based on the same factual and legal theories.

8 **PROTECTING THE INTERESTS OF THE CLASS MEMBERS**

9 39. Plaintiff is a representative who will fully and adequately assert and protect the
10 interests of the Class, and has retained competent counsel. Accordingly, Plaintiff is an adequate
11 representative and will fairly and adequately protect the interests of the Class.

12 **PROCEEDING VIA CLASS ACTION IS SUPERIOR AND ADVISABLE**

13 40. A class action is superior to all other available methods for the fair and efficient
14 adjudication of this lawsuit, because individual litigation of the claims of all members of the Class
15 is economically unfeasible and procedurally impracticable. While the aggregate damages sustained
16 by the Class are in the millions of dollars, the individual damages incurred by each member of the
17 Class resulting from Defendant's wrongful conduct are too small to warrant the expense of
18 individual lawsuits. The likelihood of individual Class members prosecuting their own separate
19 claims is remote, and, even if every member of the Class could afford individual litigation, the
20 court system would be unduly burdened by individual litigation of such cases.

21 41. The prosecution of separate actions by members of the Class would create a risk of
22 establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. For
23 example, one court might enjoin Defendant from performing the challenged acts, whereas another
24 may not. Additionally, individual actions may be dispositive of the interests of the Class, although
25 certain class members are not parties to such actions.

COUNT I

VIOLATION OF 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(d)
(On Behalf of Plaintiff and the Internal Do Not Call Class)

42. Plaintiff re-alleges and incorporates the foregoing allegations set forth in paragraphs 1 through 41 as if fully set forth herein.

43. In pertinent part, 47 C.F.R. § 64.1200(d) provides:

No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(1) Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

(2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

44. Under 47 C.F.R § 64.1200(e), the rules set forth in 47 C.F.R. § 64.1200(d) are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers.

45. Plaintiff and the Internal Do Not Call Class members made requests to Defendant not to receive calls from Defendant.

46. Defendant failed to honor Plaintiff and the Internal Do Not Call Class members opt-out requests.

47. Defendant's refusal to honor opt-out requests is indicative of Defendant's failure to implement a written policy for maintaining a do-not-call list and to train its personnel engaged in telemarketing on the existence and use of the do-not-call-list.

48. Thus, Defendant has violated 47 C.F.R. § 64.1200(d).

49. Pursuant to section 227(c)(5) of the TCPA, Plaintiff and the Internal Do Not Call Class members are entitled to an award of \$500.00 in statutory damages, for each and every negligent violation.

50. As a result of Defendant's knowing or willful conduct, Plaintiff and the Internal Do Not Call Class members are entitled to an award of \$1,500.00 in statutory damages per violation.

51. Plaintiff and the Internal Do Not Call Class members are also entitled to and seek injunctive relief prohibiting Defendant's illegal conduct in the future, pursuant to section 227(c)(5).

COUNT II
Violations of 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(c)
(On Behalf of Plaintiff and the Do Not Call Class)

52. Plaintiff re-alleges and incorporates the allegations of paragraphs 1-41 as if fully set forth herein.

53. The TCPA's implementing regulation, 47 C.F.R. § 64.1200(c), provides that “[n]o person or entity shall initiate any telephone solicitation” to “[a] residential telephone subscriber who has registered their telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government.”

54. 47 C.F.R. § 64.1200(e), provides that § 64.1200(c) and (d) “are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers.”

55. 47 C.F.R. § 64.1200(d) further provides that “[n]o person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity.”

56. Any "person who has received more than one telephone call within any 12- month period by or on behalf of the same entity in violation of the regulations prescribed under this

1 subsection may" may bring a private action based on a violation of said regulations, which were
2 promulgated to protect telephone subscribers' privacy rights to avoid receiving telephone
3 solicitations to which they object. 47 U.S.C. § 227(c).

4 57. Defendant violated 47 C.F.R. § 64.1200(c) by initiating, or causing to be initiated,
5 telephone solicitations to telephone subscribers such as Plaintiff and the Do Not Call Registry
6 Class members who registered their respective telephone numbers on the National Do Not Call
7 Registry, a listing of persons who do not wish to receive telephone solicitations that is maintained
8 by the federal government.

9 58. Defendant violated 47 U.S.C. § 227(c)(5) because Plaintiff and the Do Not Call
10 Registry Class received more than one telephone call in a 12-month period made by or on behalf
11 of Defendant in violation of 47 C.F.R. § 64.1200, as described above.

12 59. As a result of Defendant's conduct as alleged herein, Plaintiff and the Do Not Call
13 Registry Class suffered actual damages and, under section 47 U.S.C. § 227(c), are entitled, inter
14 alia, to receive up to \$500 in damages for such violations of 47 C.F.R. § 64.1200.

15 60. To the extent Defendant's misconduct is determined to be willful and knowing, the
16 Court should, pursuant to 47 U.S.C. § 227(c)(5), treble the amount of statutory damages
17 recoverable by the members of the Do Not Call Registry Class.

18 **PRAYER FOR RELIEF**

19 **WHEREFORE**, Plaintiff, individually and on behalf of the Classes, prays for the
20 following relief:

- 21 a) An order certifying this case as a class action on behalf of the Classes as defined
22 above, and appointing Plaintiff as the representative of the Classes and Plaintiff's
23 counsel as Class Counsel;
- 24 b) An award of actual and statutory damages for Plaintiff and each member of the
25 Class;
- 26 c) As a result of Defendant's negligent violations of 47 U.S.C. §§ 227, *et seq.*, and its
27 implementing regulations, Plaintiff seeks for themselves and each member of the

1 Class \$500.00 in statutory damages for each and every violation pursuant to 47
2 U.S.C. § 277(b)(3);

- 3 d) As a result of Defendant's knowing and/or willful violations of 47 U.S.C. §§ 227,
4 *et seq.*, and its implementing regulations, Plaintiff seeks for themselves and each
5 member of the Classes treble damages, as provided by statute, up to \$1,500.00 for
6 each and every violation pursuant to 47 U.S.C. § 277(b)(3)(B) and § 277(b)(3)(C);
7 e) An order declaring that Defendant's actions, as set out above, violate the TCPA;
8 f) An injunction requiring Defendant to cease all unsolicited call activity, and to
9 otherwise protect the interests of the Class;
10 g) An injunction prohibiting Defendant from using, or contracting the use of, an
11 ATDS without obtaining, recipient's consent to receive calls made with such
12 equipment;
13 h) Such further and other relief as the Court deems necessary.

14 **JURY DEMAND**

15 Plaintiff hereby demands a trial by jury.

16 **DOCUMENT PRESERVATION DEMAND**

17 Plaintiff demands that Defendants take affirmative steps to preserve all records, lists,
18 electronic databases or other itemizations associated with the allegations herein, including all
19 records, lists, electronic databases or other itemizations in the possession of any vendors,
20 individuals, and/or companies contracted, hired, or directed by Defendant to assist in sending the
21 alleged communications.

22 DATED: June 8, 2021
23

24 Respectfully Submitted,
25

26 **IJH LAW**
27

28 */s/ Ignacio J. Hiraldo*

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